Not To Be Published:

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

JOYCE M. RIKER-VANHOLLAND, Plaintiff, vs. TRANSOUTH FINANCIAL CORPORATION and ROBERT HUNTER, Defendants.	No. C04-4009-MWB **ORDER REGARDING DEFENDANTS' MOTION TO DISMISS**

I. INTRODUCTION AND BACKGROUND

On a motion to dismiss, the court must assume all facts alleged in the plaintiff's complaint are true, and must liberally construe those allegations. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Therefore, the following factual background is drawn from the plaintiff's complaint in such a manner.

Mr. Thomas Riker had an outstanding loan obligation to defendant Transouth Financial Corporation ("Transouth"). Mr. Riker defaulted on his obligations to Transouth. After this default, Transouth repeatedly called the plaintiff, Joyce M. Riker-Vanholland ("Riker-Vanholland"), knowing that she had no legal obligations with respect to the Riker-Transouth loan, and demanded money from her. On September 9, 2001, Transouth called the plaintiff at work demanding money. At that point, the plaintiff informed Transouth that the loan was not her responsibility, and that Transouth should not call her anymore. On September 29, 2001, Mr. Robert Hunter, General Manager of Transouth, called the

plaintiff and demanded money. Mr. Hunter was abusive to the plaintiff during this conversation—he demanded to know personal information, called Riker-Vanholland and her son[1] names, and threatened to have them arrested for bank fraud.

On February 20, 2004, Riker-Vanholland, acting *pro se*, filed a complaint. (Doc. No. 1). The complaint asserts claims for: (1) violation of the plaintiff's Civil Rights and Constitutional Rights; and (2) state law tort claims based on harassment, invasion of privacy and intimidation. The complaint further alleged a claim for emotional distress, and asked for punitive damages. The complaint asserted that jurisdiction was proper under both federal question jurisdiction (violation of her Constitutional and Civil rights), and under diversity jurisdiction (plaintiff is a resident of South Dakota and Transouth is incorporated under Nebraska law and does business in the state of Iowa).

On April 2, 2004, the defendants filed a Motion to Dismiss. (Doc. No. 6). Specifically, the defendants' motion asserts that the plaintiff's complaint fails to state a claim upon which relief can be granted in two respects: (1) the plaintiff's constitutional claim must be dismissed because the plaintiff has alleged no facts that would support a conclusion that the defendant was a state actor or acting under the color of law; and (2) plaintiff's state law tort claims are barred by the applicable statute of limitations. On April 13, 2004, the plaintiff filed a response to the defendants' motion to dismiss. (Doc. No. 7). In her response the plaintiff asserts that her state law claims are not barred by the statute of limitations as a five-year statute of limitations applies. The plaintiff also seems to assert that she is maintaining a "Civil RICO" claim that has a five-year statute of limitations.

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[1]For the purposes of this motion the court assumes that Mr. Thomas Riker is the plaintiff's son.

II. LEGAL ANALYSIS

A. Standards For Motions To Dismiss

Federal Rule of Civil Procedure 12(b)(6) authorizes the district courts to dismiss any complaint which fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Rule 12(b)(6) affords a defendant an opportunity to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything alleged in the complaint is true. Under this standard, a complaint should be dismissed only where it appears that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Knapp v. Hanson*, 183 F.3d 786, 788 (8th Cir. 1999) ("A motion to dismiss should be granted only if 'it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief."') (quoting *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986), and citing *Conley v. Gibson*, 355 U.S. 41, 45- 46 (1957)). In applying this standard, the court must presume all factual allegations in the complaint as true and draw all reasonable inferences in favor of the non-moving party. *E.g.*, *Whitmore v. Harrington*, 204 F.3d 784, 784 (8th Cir. 2000); *accord Cruz v. Beto*, 405 U.S. 319, 322 (1972); *Anderson v. Franklin County, Mo.*, 192 F.3d 1125, 1131 (8th Cir. 1999); *Gross v. Weber*, 186 F.3d 1089, 1090 (8th Cir. 1999); *Midwestern Mach., Inc. v. Northwest Airlines, Inc.*, 167 F.3d 439, 441 (8th Cir. 1999); *Valiant- Bey v. Morris*, 829 F.2d 1441, 1443 (8th Cir. 1987). The court need not, however, accord the presumption of truthfulness to any legal conclusions, opinions or deductions, even if they are couched as factual allegations. *Silver v. H & R Block, Inc.*, 105 F.3d 394, 397 (8th Cir. 1997) (citing *In re Syntex Corp. Securities Lit.*, 95 F.3d 922, 926 (9th Cir. 1996)); *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990) (the court "do[es] not, however, blindly accept the legal conclusions drawn by the pleader from the facts," citing *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987), and

5 Charles A. Wright et al., Federal Practice And Procedure § 1357, at 595-97 (1969)); *see also LRL Props. v. Portage Metro Hous. Auth.*, 55 F.3d 1097, 1103 (6th Cir. 1995) (the court "need not accept as true legal conclusions or unwarranted factual inferences," quoting *Morgan*, 829 F.2d at 12).

In this case the plaintiff is acting *pro se*. "In the context of a motion to dismiss for failure to state a claim under [Rule 12(b)(6)], a pro se complaint must be liberally construed." *Blomberg v. Schneiderheinz*, 632 F.3d 698, 699 (8th Cir. 1980); *see also Smith v. St. Bernards Reg. Med. Ctr.*, 19 F.3d 1254, 1255 (8th Cir. 1994). "[A] court should not dismiss [a *pro se*] complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Valiant-Bey v. Morris*, 829 F.2d 1441, 1443 (8th Cir. 1987)(quotes and citation omitted). Further, as the Federal Rules contemplate a "liberal system of notice pleading," to survive a motion to dismiss, the plaintiff is required only to plead a factual basis from which inferences supporting the legal conclusions the complaint seeks can arise. *Kohl v. Casson,* 5 F.2d 1141, 1148 (8th Cir. 1993); *Simpson v. Iowa Health Sys.*, 2001 WL 34008480 at *5 (N.D. Iowa Aug. 22, 2001). With these principles in mind, the court now turns to an analysis of the defendants' motion to dismiss.

B. Constitutional Claim

As the defendants correctly state, in order to proceed with a constitutional claim, Riker-Vanholland must establish that the defendants were "state actors" when they violated her constitutional rights as the Fifth and Fourteenth Amendments only protect private individuals from action by the federal or state government. *See Flagg Brothers v. Brooks*, 436 U.S. 148, 156, 98 S. Ct. 1729, 56 L. Ed. 2d 185 (1978) ("most rights secured by the Constitution are protected only against infringement by governments"). The Fourteenth

Amendment does not protect an individual from private conduct, no matter how discriminatory, wrongful, or egregious the conduct. *See Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974) (recognizing that Fourteenth Amendment does not shield a party from "private conduct 'however discriminatory or wrongful'") (citation omitted). As the plaintiff's complaint fails to assert, in any manner, that the defendants were "state actors" or "acting under the color of law" when her constitutional rights were allegedly violated, she has failed to state a claim upon which relief can be granted.

C. Civil RICO Claim

The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.*, imposes criminal and civil liability upon persons who engage in certain prohibited activity. The plaintiff appears to allege a "pattern of racketeering" civil RICO claim, which is governed by 18 U.S.C. § 1962(c):

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). For a "pattern of racketeering activity" to exist under the statute, there must be at least two acts of racketeering activity in the last ten years. *Id.* § 1961(5); *H.K. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 237, 109 S. Ct. 2893, 106 L. Ed. 195 (1989). Acts of racketeering are also called 'predicate acts,' *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 990 (8th Cir. 1989), and only certain acts qualify as predicate acts. *Midwest Heritage Bank v. Northway*, 576 N.W.2d 588 (Iowa 1998).

Qualifying predicate acts are enumerated in 18 U.S.C. § 1961(1). The plaintiff does not allege any acts that would qualify as a predicate act. Therefore, to the extent the plaintiff asserts a civil RICO claim, the defendants' motion to dismiss is granted.

D. State Law Tort Claims

Federal courts in diversity cases are required to apply the forum's choice of law rules in resolving conflicts of law questions. *Klaxon Co. v. Stentor Elec. Mfg. Co., Inc.*, 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941). Accordingly, the court must look to Iowa's conflicts law to determine the applicable statute of limitations. *Guaranty Trust Co. v. York*, 326 U.S. 99, 107-112, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945). Iowa's choice-of-law rules require the court to apply the forum state's law to matters classified as 'procedural.' *Brooks v. Engel*, 207 N.W.2d 110, 113 (Iowa 1973). As Iowa law classifies statutes of limitation as procedural, Iowa statutes of limitation apply to this matter. *See Cameron v. Hardisty*, 407 N.W.2d 595, 596 (Iowa 1987).

The defendants assert that the plaintiff's state law tort claims are personal injury claims, thereby making the limitations period for "Injuries to person or reputation" appropriate.

> **2. Injuries to person or reputation—relative rights—statute penalty**. Those founded on injuries to the person or reputation, including injuries to relative rights, whether based on contract or tort, or for a statute penalty, within two years.

IOWA CODE § 614.1(2). The plaintiff generally alleges that these claims are entitled to a five year statute of limitations under section 614.1.

The plaintiff's claims for harassment, invasion of privacy, slander, intimidation, and emotional distress are all personal injury tort claims, and are subject to the two-year limitations period of section 614.1(2). *See Knutson v. Sioux Tools, Inc.*, 990 F. Supp.

1114, 1119 (N.D. Iowa 1998) (finding two-year limitations period embodied in IOWA CODE § 614.1(2) applicable to plaintiff's claims of intention infliction of emotional distress and assault); *Kiner v. Reliance Ins. Co.*, 463 N.W.2d 9, (Iowa 1990) (applying two-year statute of limitations found in § 614.1(2) to slander action and noting that statute of limitations begins to run on the date of publication); *Clark v. Figge*, 181 N.W.2d 211, 214 (Iowa 1970) (defining 'injuries to relative rights' statute to mean 'injuries to the person or reputation'). The plaintiff's personal injury claims are predicated on incidents that occurred in September 2001. The plaintiff's complaint was filed on February 20, 2004—over three years after the alleged incidents occurred. The plaintiff's state-law personal injury claims are barred by the statute of limitations.

E. State Law Fraud Claim

In her response to the defendants' motion to dismiss, Riker-Vanholland appears to assert a claim for fraud—this assumption is drawn from the fact that the plaintiff claims a five year limitations period and that the defendants engaged in a fraudulent scheme to extort money from her. Plaintiff is correct that a five year statute of limitations applies to fraud claims. IOWA CODE § 614.1(4) (providing that actions founded on fraud must be brought within five years). Plaintiff alleges that a fraudulent scheme occurred in September 2001, and her complaint was filed in February 2004—within the five year statute of limitations.

Though the fraud claim survives a statute of limitations challenge, the court must determine whether it is sufficiently plead. Rule 9(b) of the Federal Rules of Civil Procedure "requires a plaintiff to allege with particularity the facts constituting the fraud." *See Independent Business Forms v. A-M Graphics*, 127 F.3d 698, 703 n.2 (8th Cir. 1997); *see also Roberts v. Francis*, 128 F.3d 647, 651 (8th Cir. 1997) ("Under Rule 9(b), '[i]n

all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity.'"). "When pleading fraud, a plaintiff cannot simply make conclusory allegations." *Roberts*, 128 F.3d at 651 (citing *Commercial Property Inv., Inc. v. Quality Inns Int'l*, 61 F.3d 639, 644 (8th Cir.1995)). In this legal analysis, the court will focus on the adequacy of the pleadings of fraud with respect to the pleading of scienter.

In light of the requirements imposed by Rule 9(b), this court has held that

> general averments of the defendants' knowledge of material falsity will not suffice. Consistent with FED. R. CIV. P. 9(b), the complaint must set forth specific facts that make it reasonable to believe that defendant[s] knew that a statement was materially false or misleading."

Brown v. North Cent. F.S., Inc., 173 F.R.D. 658, 669 (N.D. Iowa 1997) (quoting *Lucia v. Prospect Street High Income Portfolio, Inc.*, 36 F.3d 170, 174 (1st Cir. 1994), in turn quoting *Serabian v. Amoskeag Bank Shares, Inc.*, 24 F.3d 357, 361 (1st Cir. 1994)); *Brown v. North Cent. F.S., Inc.*, 951 F. Supp. 1383, 1408 (N.D. Iowa 1996) (quoting *DeWit v. Firstar Corp.*, 879 F. Supp. 947, 989-90 (N.D. Iowa 1995)). The plaintiff's fraud claim, which is only alleged in the complaint through inference, is clearly deficiently plead. The plaintiff shall be granted time in which to file an amended complaint that adequately pleads fraud with particularity as required by Rule (9)(b).

F. Debt Collection Practices

While Riker-Vanholland does not expressly verbalize claims for violation of federal and state statutes governing debt collection practices, the factual allegations contained in the complaint appear to lead towards that type of claim. In order to prevent consumer abuse, both federal and state law impose limits on the means by which a debt collector can attempt to collect a debt. The court will now assess Riker-Vanholland's claims under these

federal and state statutory schemes.

The Fair Debt Collections Practices Act, 15 U.S.C. § 1692, *et seq*. ("FDCPA"), was designed, in part, to protect consumers from abusive debt collection practices. 15 U.S.C. § 1692(e). The FDCPA prohibits certain types of collection practices, such as the use or threat of violence, obscene language, publication of shame lists, and harassing or anonymous telephone calls. *Id*. § 1692(d). It also generally prohibits "conduct the natural consequence of which is to harass, oppress, or abuse any person." *Id*. A successful plaintiff can recover actual damages, statutory damages up to $1,000, attorney fees and costs. *Id*. § 1692k(a). However, actions to enforce liability under the FDCPA must be brought "within one year from the date on which the violation occurs." *Id*. § 1692k(d); *see Freyermuth v. Credit Bureau Servs., Inc.*, 248 F.3d 767, 770 (8th Cir. 2001) (finding, in case of allegedly abusive debt collection letter, that the violation of the FDCPA occurred on the date the letter was sent to the debtor, and holding that as the letter was sent more than one-year before the case was filed that the action was time-barred); *James v. Ford Motor Credit Co.*, 47 F.3d 961, 963 (8th Cir. 1995) (noting the one-year limitation). In this instance, the alleged violations occurred in September 2001—clearly more than a year before the filing of this action in February 2004. Therefore, any FDCPA claim that the plaintiff may have attempted to assert in her complaint is time-barred.

Iowa law also protects consumers against abusive debt collection practices via the "Iowa Debt Collections Practices Act," IOWA CODE § 537.7101, *et seq*. ("IDCPA"). The IDCPA provides that "[a] debt collector shall not collect or attempt to collect a debt by means of an illegal threat, coercion or attempt to coerce." IOWA CODE § 537.7103(1). Debt collectors also cannot "oppress, harass or abuse a person in connection with the collection or attempted collection of debt" including "[t]he use of profane or obscene language," *Id*. § 537.7103(2)(a), and "engaging a person in telephone conversation

repeatedly or continuously or at unusual hours or times known to be inconvenient, with intent to annoy, harass or threaten a person." *Id.* § 537.7103(2)(d). The plaintiff's complaint implies that the defendants employed these types of unlawful debt collection practices. In terms of the appropriate statute of limitations period for an action under the IDCPA, Iowa law does not specifically provide for a limitations period, therefore an IDCPA action would fall under the five-year limitations period for actions "not otherwise provided for." IOWA CODE § 614.1(4) ("all other actions not provided for . . . within five years"). As the conduct alleged to violate the IDCPA occurred within the last five years, the action is not barred by the statute of limitations. However, the complaint does not set forth with specificity a claim for violation of the IDCPA. Like the fraud claim, the plaintiff shall be given time in which to file an amended complaint in which to plead an IDCPA violation with appropriate specificity.

III. CONCLUSION

For the reasons stated above, the court concludes that the plaintiff can prove no set of facts that would entitle her to relief on her constitutional claim, civil RICO claim or state law tort claims—therefore, as to these claims, the defendants' motion to dismiss is **granted**. The plaintiff's claims for fraud and IDCPA violations were filed within the limitations period, though the complaint fails to plead fraud with the particularity required by Rule 9(b) and fails to specifically allege a claim under the IDCPA. Also, the plaintiff alleges that complete diversity of the parties exists, thereby satisfying the first requirement of federal jurisdiction under 28 U.S.C. § 1332. However, for the court to retain jurisdiction there is an additional requirement—that the amount in controversy exceed $75,000.00. 28 U.S.C. § 1332(a). The plaintiff does not allege damages in an amount exceeding $75,000.00, and the court is unable to divine from the pleadings whether this

requirement is satisfied. The plaintiff will be allowed to file an amended complaint in which to correct these deficiencies. The plaintiff is given until **on or before June 4, 2004**, in which to file **an amended complaint** adequately pleading fraud pursuant to Rule 9(b), specifically alleging a cause of action under the IDCPA and adequately asserting diversity jurisdiction under 28 U.S.C. § 1332(a).

IT IS SO ORDERED.

DATED this 7th day of May, 2004.

Mark W. Bennett

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA